Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2001

RICHARD DENNIS and PENELOPE DENNIS
Petitioners

v.

CITY OF EASTON and EASTON BOARD OF HEALTH
Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER OR NOT THE SUPREME COURT OF PENNSYLVANIA DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE UNITED STATES COURT OF APPEALS AND THIS HONORABLE COURT WHERE IT UPHELD AN ORDER OF SUMMARY JUDGMENT IN FAVOR OF A MUNICIPAL CORPORATION WHICH IN VIOLATION OF 42 U.S.C. §1983 ARBITRARILY AND CAPRICIOUSLY CLOSED DOWN PETITIONERS' "MOM AND POP" STORE, FRUSTRATED JUDICIAL REVIEW BY NOT HAVING A STENOGRAPHER AT THE INITIAL HEARING, DELAYED THE HEARING SIX MORE YEARS AND THEN DECIDED THAT THE PETITIONERS LOST THEIR RIGHT TO A HEARING BECAUSE OF THE PASSAGE OF TIME?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Richard Dennis and Penelope Dennis, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Pennsylvania.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania rendered March 1, 2002, is unrecorded and appears at Page 1 of the Appendix herein.

The Order and Opinion of the Commonwealth Court of Pennsylvania dated June 28, 2001 is unrecorded and appears at page 2 of the Appendix herein.

The Order and Opinion of the Court of Common Pleas of Northampton County, Pennsylvania dated September 27, 2000 is unrecorded and appears at Page 15a of the Appendix herein.

The Order and Memorandum of the United States

District Court for the Eastern District of Pennsylvania dated January 22, 1996 is unrecorded and appears at Page 3IQ of the Appendix herein.

JURISDICTION

The final Order of the Supreme Court of Pennsylvania is dated March 1, 2002 and the petition For Writ Of Certiorari is timely filed within 90 days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 10(b) and (c). The jurisdiction of the lower court was based upon 42 U.S.C. §1983

STATUTES INVOLVED IN THIS CASE

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Procedural History

On May 17, 1994, without any hearing process, without any prior formal written inspection or notice, and without any notice of an emergency situation to protect the public health or welfare, Respondents, City of Easton and Easton Board of Health, permanently closed Petitioners' "Mom and Pop" prepackaged dry goods store known as "Penny's" Petitioners immediately sought a hearing before the Easton Board of health which was conducted

on June 30, 1994 without an official or unofficial transcript made of the proceedings. On June 30, 1994, the Easton Board of Health affirmed the ex parte closure of the store.

After the non-recorded hearing before the Easton Board of Health, Petitioners filed their first judicial complaint in the Court of Common Pleas of Northampton County seeking judicial review of the store's closure at Count Three of the Complaint under the Local Administration Agency law, and damages at Counts One and Two for the ex parte closure of the store under the Federal Civil Rights Act, 42 U.S.C. §1983. Respondents transferred the entire action to Federal Court where the matter was listed for arbitration. On February 24, 1994, the Federal arbitration panel decided for Respondents. Petitioners filed a timely demand for a jury trial de novo.

Respondents moved for summary judgment. The Federal Court held that there was no violation of the Due

Process cause because Pennsylvania law clearly gave the Petitioners an opportunity to be heard both before the Eastor Board of Health and thereafter before the Court of Common Pleas. The trial court granted Respondents' Motion for Summary Judgment on the Federal Civil Rights claims, but dismissed the Local Agency Appeal, without prejudice, for subsequent review by the Court of Common Pleas of Northampton County.

Petitioners timely filed a one-count Complaint seeking review of the initial closure of the store. Again, Respondents moved for summary judgment. On May 14, 1997, the Court of Common Pleas held that the claim seeking judicial review under the Local Agency Law was not barred , but because the Easton Board of Health never made a record of its proceeding, the Judge remanded the case back to the Easton board of Health to create a full and complete record.

On March 3, 1999--twenty-one (21) months after being advised by Judge Freedberg to give Petitioners a hearing--and some sixty-seven (67) months after the closure of the store--a hearing was held by the Easton Board of Health, purportedly concerning the closure. Instead, the Board of Health created a cored that established in November, 1997, Petitioners lost the realty to the mortgagors at a mortgage foreclosure sale. Because the Petitioners no longer owned the store, the Board of Health found that Petitioners had no standing to challenge the closure of the store on May 17, 1994. Petitioners filed a third Complaint under Local Agency Law and 42 U.S.C. §1983.

In an Opinion and Order of September 27, 2000, the trial court determined that the controversy was "moot" and granted summary judgment in favor of Respondents and against Petitioners on all claims. Pennsylvania's Commonwealth Court affirmed the Order

granting Summary Judgment on June 28, 2001. On March 1, 2002, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal.

B. **Statement of Facts**

On May 17, 1994, Edward Ferraro, acting as a City Sanitarian, came to Penny's Store, posted it and ordered it closed for business without any prior court order, and solely in the discretion of Edward Ferraro. After the closure, Petitioners timely filed an appeal from the ex parte order closing Penny's Store.

The only Inspection Report that Petitioners had was an obsolete one dated December 11, 1991. There was nothing in that report about closing the store, or even suggesting that there was any reason for closing down the store. Edward Ferraro testified that he had "voluminous notes" showing subsequent inspections after December 11, 1991, but he did not bring them with him. Respondents failed to make a stenographic record of the

hearing. Additionally, Petitioners' counsel advised the Board that Petitioners had six independent witnesses who wished to be heard about the excellent, clean condition of the store, but the Board refused to permit the six independent witnesses to testify.

On March 3, 1999. 654 days after Judge Freedberg ordered a remand and 1746 days after Respondents closed the store, Respondents finally met for a hearing at which time Petitioners appeared with counsel to have a hearing concerning the arbitrary and capricious closure of Petitioners' store on May 17, 1994. Instead of giving Petitioners the hearing ordered, Respondents established that Petitioner's lost Penny's Corner Store by an involuntary transfer, and that as of October 30, 1998, the realty was no longer owned by Petitioners The realty entailed not only the store Petitioners operated since 1970. but Petitioners' residence where they raised their children. Petitioners did involuntarily close the realty

known as Penny's Corner Store because after Respondents closed the store in May, 1994, Petitioners could no longer maintain their cash flow of about $500,000.00 per year. Petitioners lost everything because Respondents slapped a "Closed By Order Of Health Board" sign on their store in 1994. No court has ever ruled on the merits of that closure. Petitioners should be able to sue because they lost their store, their home, and their livelihood, and no court has ever found that it was done properly. Petitioners thus respectfully seek review by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Review by certiorari is appropriate in this case under Rule 10(b) and (c) of Rules of the United States Supreme Court in that a State court of last resort has decided an important federal question in a way that conflicts with the relevant decisions of the United States Court of Appeals and the United States Supreme Court.

1. Petitioners have standing to contest the closure of their store. Standing To pursue a Local Agency Appeal is governed by statute, 2 Pa. C.S.A. §752. The appellate courts of the Commonwealth of Pennsylvania have noted that the standing requirement under the Local Agency law is less strict than traditional standing rules. See *City of Philadelphia v. Philadelphia Board of Licensing & Inspection*, 669 A.2d 460 (Pa. Cmwlth. 1995). Applying this standard, Petitioners are aggrieved by the improper closing of Penny's Store. On that day, they were the owners of the realty in which Penny's business was located. Petitioners remain the owners of the business of Penny's Corner Store. Due to the improper closure of Penny's, Petitioners were unable to make the mortgage payments on the realty, which was foreclosed upon and sold at Sheriff's sale.

Petitioners suffered a demonstrable loss as a result of the May 17, 1994 closure. The lower court recognized

this fact by ordering that a hearing be held and a record of that hearing made, so the proceedings could be subject to judicial review. The City's apparent position--that if the City delays a Local Agency hearing for long enough, it need not hold a hearing at all-is simply untenable and unjust.

2. The controversy is not moot. The trial court opined that because "...Plaintiffs would not be able to obtain an award of damages from...this court..." the controversy was moot. Commonwealth Court adopted this approach:

> "Moreover, to the extent that the Dennises attempt, in their third complaint, to fashion a Section 1983 claim based on the Board's dismissal of the remand hearing, such a claim is without merit. When common pleas remanded the matter, it did so in order to facilitate judicial review pursuant to the Local Agency law, a review which could lead to reversal of the administrative action, but which would not provide for damages. When the board convened the remand hearing, it became evident that the Dennises had long since been divested of any interest in the property. This

> rendered moot any further review under the Local Agency Law of the administrative decision to close the store. Clearly, dismissal of a claim which has become moot is not a violation of due process."
> Appendix Page 12a

The trial court failed to recognize that Counts 2 and 3 were specifically for damages under 42 U.S.C. 1983. The Federal Civil Rights Act specifically indicates that offenders "...shall be liable to the party injured in an action at law." See, *Farrar v. Hubby*, __ U.S. , 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Pato v. LaPrade*, 524 F.2d 862 (3d Cir. 1975). Hence, the trial court erred as a matter of law by holding that the court could not award damages where Counts Two and Three were clearly claims for damages under 42 U.S.C. §1983. Petitioners therefore respectfully seek review by this Honorable Court.

3. The Order granting Respondents' summary judgment motion of Petitioners; claim under 42 U.S.C. 1983 contravenes well-established decision of this Honorable Court. As indicated by this Honorable Court in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (181), and *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), the Fourteenth Amendment to the United States Constitution imposes upon state agencies and municipal corporations the obligation not to deprive persons of life, liberty or property without due process of law. In the instance of municipal action involving a "pre-seizure", there must be a meaningful "post-deprivation" hearing before the owner is finally deprived of a property interest. *Board of Rights v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). See, also, *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 436, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

In this litigation, the trial and Commonwealth

Court judges failed to cite a single federal or state authority for the proposition that Petitioners' federal Civil Rights claims are barred. Instead, the Commonwealth Court engaged in circular logic, i.e., the claims are moot because the court cannot award Petitioners any money, and because the claims are moot, it is unnecessary to give Petitioners a full and complete hearing because they already lost the store.

Pennsylvania had a statutory scheme available to Petitioners to protect their rights, namely, a full and complete hearing before the Easton Board of Health recorded stenographically, and then judicial review before the Court of Common Pleas of Northampton County under 2 Pa. C.S.A. §702. On paper, an adequate "post-deprivation" remedy was available to the Petitioners. That is exactly why the federal judge dismissed the initial Federal Civil Rights claim on January 22, 1996.

The reality is that the statutory scheme available

to the Petitioners was intentionally frustrated by Respondents. First, the initial hearing of June 30, 1994 was conducted without the personal presence of an official court reporter, and Petitioners were precluded by a 3-1 vote from presenting witnesses. Second, the Respondents transferred the case to Federal Court only to have the Federal Court enter an Order that the case must be decided back in State Court. Then, after the case is aback in State Court, the municipal actors again sought summary judgment only to be initially told by Freedberg, J. to go back to the Easton Board of Health and give Petitioners a hearing. Despite this Order, the hearing was only held after the Petitioners lost the realty, and the Board of Health then held that the Petitioners had no standing to challenge the closure of their own store.

A crucial piece of the procedural history in this case is Judge Troutman's decision on Petitioners'

constitutional claims. Significantly, Judge Troutman's decision does not hold that the closing of Penny's was proper. Rather, Judge Troutman held that Petitioners had an adequate state law remedy under the City of Easton Health Code:

> Moreover, the hearing provision affords an aggrieved party an opportunity to be heard within thirty days of the deprivation, thereby precluding the possibility of a lengthy wrongful deprivation.
>
> Appendix Page 66a

The Federal Court also held that only a State Court could review the decision of the Easton Board of Health, and that the Federal court lacked jurisdiction to do so:

> Accordingly, we conclude that this Court lacks the requisite subject matter jurisdiction to review the decision of the Board of Health.
>
> Appendix Page 77a

This procedural posture, combined with Respondent's failure to hold a hearing of record, states new procedural due process claims from the date of Judge Freedberg's

Order that the Board of Health hold a hearing.

4. Petitioners have never been afforded an adequate post-deprivation hearing. The Federal Court explicitly found that Petitioners were deprived of a significant property interest. ("Clearly, Plaintiffs have a substantial property interest in operating their store. In closing the store, therefore, the City deprived the Plaintiffs of a significant property interest.") Appendix Page 51a

The Federal Court also held that procedural due process requires notice and an opportunity to be heard. ("an elementary and fundamental requirement of due process...is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). The Federal Court then went on to assess both whether the Health Code, as written, complied with due process, and whether the code

provisions were followed in this case.)"Thus, we conclude that the required notice of Health Code violations provides appropriate due process safeguards, and we must now assess whether these safeguards were followed by the City in the present case.").

The federal court determined that Petitioners' right to a post-deprivation hearing must be granted "in a meaningful time and manner". The District Court noted at that time that the health Code provision that a hearing be held within 30 days was a meaningful post-deprivation remedy:

> Moreover, the hearing provision affords an aggrieved party an opportunity to be heard within 30 days of the deprivation, thereby precluding the possibility of a lengthy wrongful deprivation.

Under this standard, the posture in this case is materially different than it was on the date of Judge Troutman's decision in the federal action.

On May 15, 1997, the date of Judge Freedberg's

opinion and order, Respondents were ordered to give Petitioners a hearing on the merits concerning the closure of Penny's. A hearing was not even scheduled until March 3, 1999--almost two full years later. On the hearing date, Respondents still failed to give Petitioners a hearing on the merits, and instead, determined that Petitioners had no standing, despite the Federal Court's determination that Petitioners were deprived of a property right AND the court's explicit order that a hearing be held on the merits.

Thus Petitioners have been deprived of a hearing from May 15, 1997 to the present. On this record, there is at least, a genuine issue of material fact regarding whether Respondents afforded Petitioners procedural due process by failing--for now more than four years--to give Petitioners a hearing. This claim was not before the Federal Court in 1996, and thus not barred by collateral estoppel. Hence, their Petition for a Writ of Certiorari

ought to be granted.

5. The failure to implement the Pennsylvania "Post-deprivation" remedies plus the loss of the store creates liability under 42 U.S.C. §1983. The Respondents argued, successfully, that the loss of the store ends the case. The result should have been the opposite. The loss of the store after years of failing to provide a hearing as required by statute is what creates the liability under the Federal Civil Rights Act. *Paratt v. Taylor, supra; Baker v. McCollan supra.*

6. The six year delay in reviewing Petitioner's claim under Pa. C.S.A. §752, and then claiming that Petitioners lost ownership of the store because of the closure, creates the claim for a separate and distinct constitutional rights violation. The trial court failed to recognize that Plaintiff filed a three count Complaint at 1999-C-2133. Namely, Count 1 for judicial review under

the Local Agency Law, 2 Pa. C.S.A. §702, and Counts 2 and 3 for civil liability under the Federal Civil Rights Act, 42 U.S.C. §1983.

The trial court and Respondents intentionally avoided the reality of the Petitioners well-pleaded causes of action. Judge Freedberg initially remanded the matter back on May 15, 1997 telling the Easton Board of Health to have a full and complete hearing. Then, the Board did not conduct a timely hearing, and instead wasted almost two years to give Petitioners their statutory hearing as specifically ordered by the Court. Then, the Board of Health held that it is too late for a hearing because the passage of time (almost six years from the date of closure) caused the Petitioners to lose their realty. That is exactly why there is liability under 42 U.S.C. 1983 because the Petitioners proved that there was no adequate post-deprivation hearing as mandated by law. Hence, Petitioners respectfully seek review by this Honorable

Court.

7. Consistent with the Federal Civil Rights Act, 42 U.S.C. §1983, a municipal corporation cannot arbitrarily and capriciously close down a store, frustrate judicial review by not having a stenographer at the initial hearing, delay the hearing six more years and then claim that the property owners lost their right to a hearing because of the passage of time. Petitioners have a constitutional right to liberty to live their lives the way they wanted. They chose to do this by operating a Mom & Pop store which had a cash flow of $500,000.00 per year. They lost their store, their lifestyle, the cash flow of $500,000.00 a year, and the opportunity to sell their store on the open market because of the actions of the Respondents. Hence, Petitioners respectfully seek review by this Honorable Court.

8. The Opinion and Order holding that a municipal corporation can close down a store and cause

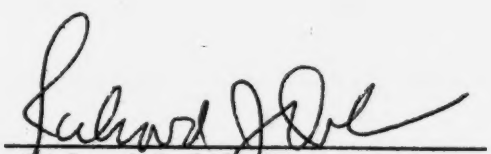
Petitioners to lose ownership of the store because the municipal corporation never gave Petitioners a prompt and full hearing before a stenographer where the record could be judicially reviewed violates Federal Civil Rights Act, 42 U.S.C. §1983. On May 17, 1994, the Respondent, City of Easton, closed down Petitioners' store. On June 30, 1994, the Respondent, Easton Board of Health conducted a hearing without a stenographer, thereby thwarting judicial review under 2 Pa. C.S.A. §702. There was no court order giving the Respondent the permission to do what it did. After it acted ex parte, it frustrated the adequacy of the "post-deprivation" remedy by not having a court stenographer record the proceeding on June 30, 1994.

No court has ever reviewed the closure of the store. Petitioners presented 90 plus affidavits from customers testifying to the cleanliness of the store. Yet the store is gone because: 1) the City closed it; and 2) there was never

a hearing before a judge reviewing the transcript of the closure which was supposed to be guaranteed by Pennsylvania's Local Administrative Agency Law. That is why there is liability under 42 U.S.C. §1983. The orders granting and affirming Respondent's motion for summary judgment are erroneous as a matter of law. Hence, Richard and Penelope Dennis seek review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Writ of Certiorari ought to be granted.



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